STATE OF MICHIGAN

IN THE SUPREME COURT

DIANE BUKOWSKI and
THE MICHIGAN CITIZEN,

Plaintiffs/Appellees,

S. Court No. 129409

Case No. COA # 256893
WCCC # 02-242574-CZ

v.

CITY OF DETROIT,

Defendant/Appellant.
_____/

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129409
Supp

PLAINTIFFS-APPELLEES' SUPPLEMENTAL BRIEF ON WHY THE COURT OF APPEALS WAS CORRECT IN INSTRUCTING THE WAYNE COUNTY CIRCUIT COURT, ON REMAND, THAT THE FREEDOM OF INFORMATION ACT'S "FRANK COMMUNICATIONS" EXEMPTION, MCL 15.243(1)(M), DOES NOT APPLY TO COMMUNICATIONS THAT ARE NO LONGER PRELIMINARY TO AN AGENCY DETERMINATION OF POLICY OR ACTION, EVEN IF THE COMMUNICATIONS WERE PRELIMINARY AT THE TIME THEY WERE MADE

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

INDEX OF AUTHORITIES

CASES

STATUTES

LEGISLATIVE HISTORY

REFERENCES

STATEMENT OF JURISDICTIONAL BASIS

This Supplemental Brief is submitted pursuant to the Michigan Supreme Court Order dated December 8, 2006, in which the Court requested the parties to address whether the Michigan Court of Appeals erred in instructing the Wayne County Circuit Court, on remand, that the Freedom of Information Act "frank communications" exemption, MCL 15.243(1)(m), does not apply to communications that are no longer preliminary to an agency determination of policy or action, even if the communications were preliminary at the time they were made.

STATEMENT OF QUESTIONS PRESENTED

1. Does the phrase "are preliminary to a final agency determination of agency policy or action" unambiguously mean "are preliminary" and not "were preliminary at the time they were made"?

Plaintiff-Appellees say Yes.
Defendant –Appellants say No.
The Michigan Court of Appeals said Yes.

2. Did the Michigan Court of Appeals strictly and correctly construe the unambiguous words of the "frank communications" exemption in instructing the Wayne County Circuit Court, on remand, that the Freedom of Information of Act "frank communications" exemption does not apply to communications that are no longer preliminary to an agency determination of policy or action?

Plaintiff-Appellees say Yes.
Defendant –Appellants say No.
The Michigan Court of Appeals said Yes.

3. Does the Legislative History of the Freedom of Information Act demonstrate that the phrase "are preliminary to a final agency determination of agency policy or action" was consciously placed into the statute as a limitation on the "frank communications" exemption as a compromise between pro-disclosure and anti-disclosure arguments?

Plaintiff-Appellees say Yes.
Defendant –Appellants say No.

4. Under the FOIA, must documents, that were correctly withheld under an exemption to disclosure, be immediately disclosed once the exemption no longer applies?

Plaintiff-Appellees say Yes.
Defendant –Appellants say Yes.

INTRODUCTION

MCL 15.243(1)(m), the "frank communications exemption" to the Freedom of Information Act states:

> (1) A public body may exempt from disclosure as a public record under this act any of the following:
> (m) Communications and notes within a public body or between public bodies of an advisory nature to the extent that they cover other than purely factual materials and are preliminary to a final agency determination of policy or action. This exemption does not apply unless the public body shows that in the particular instance the public interest in encouraging frank communication between officials and employees of public bodies clearly outweighs the public interest in disclosures.

In Herald Company, Inc. v Eastern Michigan University Board of Regents, 475 Mich 463, 475 (2006), the Michigan Supreme Court held that documents are frank communications if (1) they are communications and notes within a public body or between public bodies of an advisory nature, (2) cover other than purely factual materials, and (3) are preliminary to a final agency determination of policy or action.

The words of the statute are unambiguous. For the exemption to apply, the communications and notes that cover other than factual material must be preliminary to a final determination of policy or action. Once the final determination of policy or action has been made, the communications and notes are no longer preliminary and at that point the exemption no longer applies. For the Court to add "were preliminary at the time they were made" to the statute would be to amend the statute and violate every principle of statutory construction advocated by the Michigan Supreme Court over the last five (5) years.

In addition, the legislative history of the Freedom of Information Act (FOIA) makes clear that the phrase "are preliminary to a final determination of policy or action" was not added in a haphazard fashion. It was only added in the third amendment to the FOIA, as a compromise

between those who were for disclosing inter and intraagency communications and notes and those who were opposed.

FOIA cases also make clear that even if an exemption may apply when the request for disclosure is initially made, once the exemption no longer applies, the materials must be disclosed and a public body can even be assessed attorney fees for failure to do so.

In the present case, the Michigan Court of Appeals correctly held that "the frank communications exemption applies only if the communications "*are* preliminary to a final agency determination of policy or action" (emphasis added), not "*were* preliminary to a final agency determination of policy or action." The Court of Appeals properly remanded the case to the trial court to address the issue of whether the "Shoulders Report" is currently preliminary to any agency determination or policy or action so as to ascertain whether the exemption is applicable to this case. Bukowski v. City of Detroit, 2005 Mich App LEXIS 1340, p. 6. Exhibit A, attached.

I. THE WORDS OF THE STATUTE ARE UNAMBIGUOUS – "ARE PRELIMINARY" MEANS "ARE PRELIMINARY." ANY JUDICIAL REWRITING OF THE STATUTE VIOLATES THE STRICT STATUTORY CONSTRUCTION THAT IS THE RULE IN MICHIGAN.

The Michigan Supreme Court has consistently taken a strict view of not rewriting legislation or second guessing the legislature when it comes to statutory construction. It has emphasized that when interpreting a statute, there is a presumption that every word is used for a purpose, and every word as written is to be given effect. For example, in Pohutski v. City of Allen Park, 465 Mich. 675, 683-684 (Mich. 2002), the Court held:

> When faced with questions of statutory interpretation, our obligation is to discern and give effect to the Legislature's intent as expressed [***9] in the words of the statute. DiBenedetto v West Shore Hosp, 461 Mich. 394, 402; 605 N.W.2d 300 (2000); Massey v Mandell, 462 Mich. 375, 379-380; 614 N.W.2d 70 (2000). We give the words of a statute their plain and ordinary meaning, looking outside the

> statute to ascertain the Legislature's intent only if the statutory language is ambiguous. Turner v Auto Club Ins Ass'n, 448 Mich. 22, 27, 528 N.W.2d 681 (1995). Where the language is unambiguous, "we presume that the Legislature intended the meaning clearly expressed---no further judicial construction is required or permitted, and the statute must be enforced as written." DiBenedetto, 461 Mich. at 402. Similarly, courts may not speculate about an unstated purpose where the unambiguous text plainly reflects the intent of the Legislature. See Lansing v Lansing Twp, 356 Mich. 641, 649-650; 97 N.W.2d 804 (1959). [*684] When parsing a statute, we presume every word is used for a purpose. As far as possible, we give effect to every clause and sentence. "HN6 The Court may not assume that the Legislature inadvertently made use of one word or [***10] phrase instead of another." Robinson v Detroit, 462 Mich. 439, 459; 613 N.W.2d 307 (2000). Similarly, we should take care to avoid a construction that renders any part of the statute surplusage or nugatory. In re MCI, 460 Mich. at 414.

In People v. Guerra, 469 Mich. 966 (Mich. 2003), the Court reiterated this strict view of statutory construction and held that Michigan courts and parties are to look at the express terms of the state statute, and not at similar federal statutes for guidance. The Court held:

> Where, as here, the statute is unambiguous, the appellate court must assume that the legislature intended its plain meaning and the statute must be enforced as written. Stated differently, a court may read nothing into an unambiguous statute that is not within the manifest intent of the legislature as derived from the words of the statute itself. Only where the statutory language is ambiguous may a court properly go beyond the words of the statute to ascertain legislative intent. People v Phillips, 469 Mich. 390, 666 N.W.2d 657 (2003); Gilbert v Second Injury Fund, 463 Mich. 866, 616 N.W.2d 161 (2000); People v Davis, 468 Mich. 77, 658 N.W.2d 800 (2003); Dan De Farms, Inc v Sterling Farm Supply, Inc, 465 Mich. 872, 633 N.W.2d 824 (2001); Dibenedetto v West Shore Hosp, 461 Mich. 394, 605 N.W.2d 300 (2001); Pohutski v City of Allen Park, 465 Mich. 675, 641 N.W.2d 219 (2001); State Farm Fire & Casualty Co v Old Republic Ins Co, 466 Mich. 142, 644 N.W.2d 715 (2003). [***3] Consequently, future courts and parties are well-advised to look to the expressly defined terms of our statute rather than to the federal RICO statute for guidance.

In Federated Pub's v. City of Lansing, 467 Mich. 98, 107 (Mich. 2002), the Michigan Supreme Court emphasized that every phrase and word is to be given its plain and ordinary meaning, holding:

> As stated on numerous occasions by this Court, HN17 the primary goal of judicial interpretation of statutes is to discern and give effect to the intent of the Legislature. This Court discerns that intent by examining the specific language of

a statute. If the language is clear, this Court presumes that [***13] the Legislature intended the meaning it has plainly expressed and the statute will be enforced as written. Pohutski v City of Allen Park, 465 Mich. 675, 683; 641 N.W.2d 219 (2002). Unless otherwise defined in the statute, or understood to have a technical or peculiar meaning in the law, every word or phrase of a statute will be given its plain and ordinary meaning. See MCL 8.3a.

Significantly, MCL 8.3a states:

All words and phrases shall be construed and understood according to the common and approved usage of the language; but technical words and phrases, and such as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning.

This case centers around the interpretation of MCL 15.243(1)(m) which states:

(1) A public body may exempt from disclosure as a public record under this act any of the following:
(m) Communications and notes within a public body or between public bodies of an advisory nature to the extent that they cover other than purely factual materials and are preliminary to a final agency determination of policy or action. This exemption does not apply unless the public body shows that in the particular instance the public interest in encouraging frank communication between officials and employees of public bodies clearly outweighs the public interest in disclosures.

In Herald Company, Inc. v Eastern Michigan University Board of Regents, 475 Mich 463, 475 (2006), the Michigan Supreme Court held that documents are frank communications if (1) they are communications and notes within a public body or between public bodies of an advisory nature, (2) cover other than purely factual materials, and (3) are preliminary to a final agency determination of policy or action.

This case concerns the third element, "are preliminary to a final agency determination of policy or action." The Court of Appeals correctly held that if the non-factual communications and notes are no longer preliminary to an agency determination of policy or action, the frank communications exemption does not apply to these communications. Defendant is asking this Court to rewrite the statute, in violation of every canon of statutory construction consistently

enunciated by this honorable Court, by extending this exemption to communications and notes that were preliminary to an agency determination of policy of action at the time they were made, but are no longer preliminary to an agency determination of policy of action. They want this Court to change "are preliminary" to "were preliminary" or to simply negate the phrase "are preliminary" totally. This would be completely inconsistent with the principles of statutory construction which this Court has emphasized in many decisions and must be summarily rejected.

The word are is defined as the "second person singular and plural and first and third person plural present indicative of be." American Heritage Dictionary of the English Language, Fourth Edition, Houghton Mifflin Co. (2006) at 94. Be is defined as "1. to exist in actuality, have life or reality; 2a to occupy a specified position (The food is on the table); 3. To take place, occur (The test was yesterday)." Id. at 155. The indicative is defined as "Of, relating to, or being the mood of the verb used in ordinary objective statements." Id. at 892. Present is defined as: "Verb tense expressing action in the present time." Id. at 1388.

The Writer's Digest, Grammar Desk Reference, Writer's Digest Books, Cincinnati, Ohio, p. 16, states that the "present tense is used to indicate an action or event occurring now, at the present time, either immediately (in the present progressive tense) or as a rule." The present progressive tense is used to indicate action happening at the very moment the statement is being made. The verb to be is the auxiliary verb in progressive tenses. Id. at 18. The indicative mood refers to the expression of a fact or a question. Most statements or questions about real events are in the indicative mood. Id. at 25.

Black's Law Dictionary defines preliminary as meaning: "Coming before and usually leading up to the main part of something." Black's Law Dictionary, 8th Edition, Thomson West

(2004). Random House Webster's College Dictionary, Random House, Inc. (2001) at 970, defines preliminary as "preceding and leading up to the main part, matter or business; introductory, preparatory."

Thus, to satisfy the element of the statute that states that the communications and notes "are preliminary to a final agency determination of policy or action," means that at the very moment the exemption is being invoked, at the present time, the communications and notes must exist prior to the final agency determination or action. Once the final agency determination or action is taken, the communications are no longer preliminary.

To interpret the exemption as referring to "communications that are preliminary to agency action at the time they are made, but that are no longer preliminary," is to change are to were, or to simply negate the language "are preliminary". Even the Court's own order dated December 8, 2006 reflects this conundrum. It states:

> The parties shall address whether the Court of Appeals erred in instructing the Wayne County Circuit Court, on remand, that the Freedom of Information Act "frank communications" exemption, MCL 15.243(1)(m) does not apply to communications that are no longer preliminary to an agency determination of policy or action, even if the communications were preliminary at the time they were made.
> Ex. B, attached, December 8, 2006 Supreme Court Order.

The Court had to rewrite the statute just to make this order. The statute simply does not include the words "are no longer preliminary to an agency determination of policy or action." or "were preliminary." In fact, the statute explicitly says "are preliminary to an agency determination of policy or action." Just to make this order this Court had to engage in the kind of rewriting or reconstructing the words of the legislature which this Court has explicitly rejected in case after case.

II. THE LEGISLATIVE HISTORY OF FOIA MAKES CLEAR THAT THE PHRASE "ARE PRELIMINARY" WAS DELIBERATELY INSERTED TO LIMIT THE SCOPE OF THE EXEMPTION.

In the present case, the unambiguous words of the statute make clear that the legislature intended that the frank communications exemption applies only to deliberative communications and notes that are preliminary to a final determination or agency action. Hence, there is no need to examine the legislative history to ascertain legislative intent.

However, if somehow the Court was to find that the language of the statute is ambiguous, the legislative history makes clear that the phrase "are preliminary" was deliberately inserted to limit the scope of the exemption.

The original proposal for the Freedom of Information Act, House Bill 6085, submitted to the House of Representatives on September 14, 1976, specifically included preliminary inter and intraagency communications in the category of writings made available to the public under the Act. The initial version of House Bill 6085 stated:

> Section 12. The following categories of writings are specifically made available to the public under this act if those writings exist and are not exempt under Section 13.
> (g) Communications between public bodies and within public bodies including preliminary intraagency, interagency, and intergovernmental drafts, notes, recommendations, and memoranda in which opinions are expressed or policies discussed or recommended.

State of Michigan, 1976 Journal of the House of Representatives pp 4152-4156. Ex. C, attached.

The House Legislative Analysis of the bill dated September 10, 1976 and September 21, 1976, makes clear that there was a lot of debate pro and con relative to this section. State of Michigan, 1976 Journal of the House of Representatives, Legislative Analysis Section for House Bill 6085. Ex. D, attached.

As a result, on September 23, 1976, House Bill 6085 was amended and the interagency communications clause was moved from non-exempted materials to public records that were exempted under the act. The amendment read:

> 13. A public body may exempt from disclosure as a public record under this act:
> (m) Communications between and within public bodies, including letters, memoranda, or statements which reflect deliberative or policy-making processes and are not purely factual, or investigative matter.

State of Michigan, 1976 Journal of the House of Representatives, pp 2842, 2843. Ex. E, attached.

This amendment did not include the "and are preliminary to a final agency determination of policy or action," language. Hence, under this amendment, the frank communications exemption would have applied in this case because there was no limitation that the communications must be preliminary to a final agency determination of policy or action to come under the exemption. Id.

However, on November, 22, 1976, the House Bill was amended a third time. At this time, the amendment as adopted changed the exemption to read:

> (l) Communications within a public body or between public bodies of an advisory nature to the extent that they cover other than purely factual materials and are preliminary to a final agency determination of policy or action. This exception shall not apply unless the public body shows that in the particular instance the public interest in encouraging frank communication between officials and employees of public bodies clearly outweighs the public interest in disclosure.

State of Michigan, 1976 Journal of the House of Representatives, pp 3210, 3211. Ex. F, attached.

Thus, this third amendment, the first one to include "and are preliminary to a final agency determination of policy or action" as well as the public interest balancing test, was clearly intended by the legislature as a compromise between a bill that would explicitly allow disclosure of all inter and intraagency communications, and a bill that would explicitly exempt all deliberative communications. The language "and are preliminary to a final agency determination of policy or action" was purposefully inserted into the internal communications section of the

FOIA. To effectuate the legislative intent this section of the bill must be enforced. Hence, non-factual communications within a public body or between public bodies of an advisory nature are only to be exempted if they are preliminary to a final agency determination of policy or action.

III. EVEN IF THE EXEMPTION APPLIED WHEN THE INITIAL REQUEST WAS MADE, ONCE THE EXEMPTION NO LONGER APPLIES THE DOCUMENTS MUST BE RELEASED.

The rule in FOIA cases is that even if the exemption applied when the request for disclosure was first made, once the exemption no longer applies, the documents must be released.

In The Evening News Association v City of Troy, 417 Mich 481 (1983), the City of Troy withheld documents pursuant to MCL 15.243(1)(b)(i), which provides an exemption for:

> (b) Investigating records compiled for law enforcement purposes, but only to the extent that disclosure as a public record would do any of the following:
> (i) Interfere with law enforcement proceedings.

One of the arguments advanced by the prosecutor in opposition to disclosure and invoking this exemption, was that disclosure would have a chilling effect on the investigation because some of the witnesses only gave statements on the promise of confidentiality. Id. at 504. This is similar to the rationale for the frank communications exemption. By the time the case reached the Court of Appeals, the public body conceded that the investigation was closed. The Court held that because the investigation was closed, the documents must be released. Id. at 517, 518.

Yarbrough v Michigan Department of Corrections, 199 Mich App 180 (1992), is another case where the public body invoked the law enforcement exemption, MCL 15.243(1)(b)(i). The Court held the trial court was correct in allowing the public body's invoking of the law enforcement exemption and withholding records while a sexual harassment investigation took

place. Id. at 185. However, while the Court noted that at the end of the investigation, the public body provided plaintiff with the requested documents, because the investigation ended June 6, 1989 and the documents were not released to plaintiff until August 17, 1989, the Court awarded plaintiff attorney fees covering that period. Id. at 186, 187.

In The Herald Company, Inc. v The City of Kalamazoo, 229 Mich App 376 (1998), the public body, also invoking the law enforcement exemption, MCL 15.243(1)(b)(i), withheld documents that were compiled during an internal investigation into the theft of narcotics from an evidence room in the Kalamazoo Department of Public Safety. By the time the case reached the Court of Appeals, a grand jury had already been convened and been adjourned. The City argued that the investigation was still open because the statute of limitations had not run and the documents might be used in future investigations. Id. at 378, 379, 382, 383.

The Court held:

> We see no basis, in state or federal cases construing the Michigan FOIA or its federal counterpart, for the proposition that an "open" investigation can be construed to continue until the expiration of the applicable period of limitation for criminal prosecution without active, ongoing law enforcement investigation.
> Id. at 386.

These cases demonstrate that because FOIA exemptions are construed narrowly, while an exemption may be enforceable at the time a request is made, once the grounds for the exemption are no longer in effect, the documents must be immediately released.

In the present case, while advisory communications and notes that are the subject of this lawsuit (the Shoulders Report) may have been preliminary to a final agency determination of policy or action when the request for their disclosure was first made, once the documents were no longer preliminary to agency or action they should have been immediately released. The Court of Appeals was correct in remanding the case to the trial court for a determination on this

issue, and holding that the frank communications exemption would not apply if the documents are no longer preliminary to a final agency determination of policy or action.

One additional note on this issue. The City of Detroit initially invoked the law enforcement exemption as a basis for not disclosing the Shoulders Report in the present case. In a hearing in front of trial Judge Baxter on September 9, 2003, the City of Detroit admitted that while invoking that exemption was proper at the time the request for disclosure was first made, because there were no current law enforcement proceedings, the exemption no longer applied. Ex. G, attached. September 9, 2003 Motion transcript, p 13.

In the same hearing, the City of Detroit admitted that the Shoulders Report was no longer preliminary to a final agency determination of policy. The City of Detroit attorney stated: "The final determination of the policy and the actions that were taken against by – I'm sorry, against Officer Eugene Brown was that no actions were taken." Again, the City of Detroit's own statement makes it clear that the Shoulders Report is no longer preliminary a final determination of policy and action. Id at 15. Under the plain language of the statute, the frank communication exemption no longer applies to this case and has not applied to this case for over 3 years.

CONCLUSION

Plaintiffs-Appellees respectfully request that this Honorable Court hold that the Court of Appeals was correct in instructing the Wayne County Circuit Court, on remand, that the Freedom of Information Act "frank communications" exemption, MCL 15.243(1)(m) does not apply to communications that are no longer preliminary to an agency determination of policy or action, even if the communications were preliminary at the time they were made.

Respectfully submitted,

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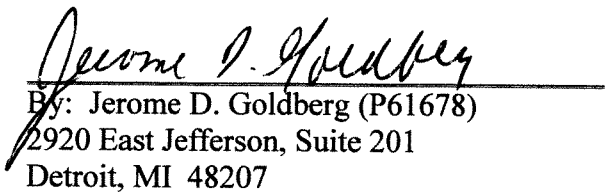

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